86-1007

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

MESSINA BUILDERS AND CONTRACTORS CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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35 pp

QUESTION PRESENTED

Section 3505 of the Internal Revenue Code provides that, where a lender furnishes funds directly or indirectly to an employer for the payment of wages, the lender in certain circumstances may be personally liable if the required employment taxes are not withheld from those wages and paid over to the IRS. The question presented is whether, as a prerequisite to the government's maintenance of a civil suit to collect the lender's personal liability in such circumstances, the IRS must have sent to the lender, within 60 days of making an assessment of the unpaid taxes against the employer, a copy of the tax bill that is required to be sent to the employer under Section 6303(a).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-15a) is reported at 801 F.2d 1029. The opinion of the district court (App., *infra,* 17a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 16a) was entered on September 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 3505 and 6303 of the Internal Revenue Code (26 U.S.C.) are set out in a statutory appendix (App., *infra,* 24a-25a).

STATEMENT

1. Respondent is a general contractor. In December 1981 respondent entered into two subcontracts with the owner of C&C Plumbing Co., whose employees performed work on the contracts until the owner was financially unable to continue. C&C Plumbing filed employment tax returns for the second and third quarters of 1982 reporting taxes due on the wages paid to C&C employees for their work on the project, but no taxes were paid. Shortly thereafter, the IRS made assessments for the unpaid taxes. The assessments were made in September and October of 1982 and in July and August of 1983. App., *infra,* 3a-4a, 19a-20a.

In June 1984, the United States brought this action against respondent[1] in the United States District Court for the Western District of Missouri alleging that respondent had supplied funds to C&C under circumstances that rendered it personally liable under Section 3505 of the Internal Revenue Code in an amount equal to a portion of the unpaid employment taxes.[2] Respondent moved for summary judgment, contending that the government was precluded from suing it because the Commissioner had not provided it with notice of the tax assessments against C&C Plumbing within the 60-day period specified in Section 6303(a) of the Code. That section provides that the Commissioner, as soon as practicable after making a tax assessment, and in any event within 60 days, must "give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." Respondent submitted that, if the instant suit were successful, it would be a

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[1] The government also asserted a claim under Section 3505 against Mike Messina, respondent's president, but the parties later agreed to dismiss him as a defendant in this action (App., *infra,* 17a n.1).

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

"person liable for the unpaid tax" within the meaning of Section 6303(a). Respondent accordingly argued that the Commissioner was required, within 60 days of making the assessments against C&C Plumbing, to send respondent as well as C&C Plumbing a copy of the tax bill described in Section 6303(a). See App., *infra,* 4a, 21a.

The district court granted respondent's motion for summary judgment (App., *infra,* 17a-23a). Relying on *United States* v. *Associates Commercial Corp.,* 721 F.2d 1094 (7th Cir. 1983), and *United States* v. *Merchants National Bank,* 772 F.2d 1522 (11th Cir. 1985), petition for cert. pending, No. 85-1480, the district court held that the notice and demand for payment specified in Section 6303(a) must be sent, not only to the taxpayer against whom social security and withholding taxes have been assessed, but also to third parties against whom the government might seek to establish personal liability, in a civil suit commenced under Section 3505, for an amount equal to any part of the withholding taxes. Since the government had not notified respondent of the assessments against C&C Plumbing within 60 days of making the assessments, the district court held that the government's suit was barred.

2. The court of appeals affirmed, one judge dissenting (App., *infra,* 1a-15a). The court noted (*id.* at 5a) that the Third Circuit in *United States* v. *Jersey Shore State Bank,* 781 F.2d 974 (1986), cert. granted, No. 85-1736 (argued Dec. 8, 1986), and the Ninth Circuit in *United States* v. *Hunter Engineers & Constructors, Inc.,* 789 F.2d 1436 (1986), petition for cert. pending, No. 86-209, have held that the government is not required to provide a third-party lender with notice under Section 6303(a) as a prerequisite to a suit to collect the lender's liability under Section 3505. The court declined to follow those decisions, however, but rather "agree[d] with the view held by the Seventh Circuit in *Associates,* and followed by the Eleventh Circuit in *Merchants,* that the IRS must provide

timely notice to a third-party lender when proceeding under section 3505(b)" (App., *infra,* 14a (footnote omitted)). The court stated that "many aspects of [the government's] arguments are persuasive * * *, [but] these considerations must bow to the plain language and meaning of the statute" (*id.* at 6a).

Judge Fairchild dissented, concluding that the reasoning of the Third Circuit in *Jersey Shore* and the Ninth Circuit in *Hunter* was "more persuasive" (App., *infra,* 14a-15a). He took issue with the majority's statement that the "plain language" of the statute compelled a ruling in respondent's favor, noting two particular deficiencies in that statement. "It seems a natural reading of § 6303(a)," Judge Fairchild said, "that 'each person liable for the unpaid tax' means each person whose liability has been determined by the assessment referred to." He further noted that "Section 3505 does not, literally, make the third-party provider 'liable for the unpaid tax,' but 'liable * * * in a sum equal to the taxes.' " App., *infra,* 15a.

REASONS FOR GRANTING THE PETITION

1. This case presents a question identical to that now pending before the Court in *Jersey Shore State Bank* v. *United States,* No. 85-1736 (argued Dec. 8, 1986). That question is whether the government, as a prerequisite to its maintenance of a civil suit to collect a lender's personal liability under Section 3505, must have sent to the lender, within 60 days of making an assessment of social security and withholding taxes against the employer, a copy of the tax bill that is required to be sent to the employer under Section 6303(a). For the reasons stated in our brief and argument in *Jersey Shore,* we believe that the court of appeals there correctly concluded that Section 6303(a) does not require such notice and, accordingly, that the decision below is erroneous. Because the two cases present identical legal questions, the outcome here should be controlled by the result in *Jersey Shore,* and there is no need for the

Court to grant plenary review in this case. It would therefore be appropriate for the Court to hold this case along with the pending petitions in *United States* v. *Merchants National Bank,* No. 85-1480, and *Hunter Engineers & Constructors, Inc.* v. *United States,* No. 86-209, pending the outcome in *Jersey Shore.*

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's decision in *Jersey Shore State Bank* v. *United States,* No. 85-1736.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-2505

UNITED STATES OF AMERICA, APPELLANT,

v.

MESSINA BUILDERS AND CONTRACTORS CO., AND MIKE MESSINA, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

Submitted: June 11, 1986
Filed: September 23, 1986

Before: JOHN R. GIBSON, MAGILL, AND FAIRCHILD,* Circuit Judges.

MAGILL, Circuit Judge.

This appeal concerns whether the Internal Revenue Service ("IRS") must notify a third party, who provides the wages an employer pays its employees, of the employer's tax deficiency on those wages. For the reasons discussed below, we affirm the judgment of the district court[1] that notice is required to a third-party provider.

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* HON. THOMAS E. FAIRCHILD, United States Senior Circuit Judge for the Seventh Circuit, sitting by designation.

[1] The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

I. PERTINENT STATUTES.

At the heart of this dispute are Internal Revenue Code ("Code") sections 3505 and 6303, 26 U.S.C. §§ 3505, 6303. Section 3505(a) creates tax liability in a third party who pays wages directly to an employer's employees, and section 3505(b) creates tax liability in a third party who, knowing that the employer will not or cannot pay its employees' withholding taxes, nonetheless supplies wages to the employer.[2]

Section 6303 provides in pertinent part:

§ 6303. Notice and demand for tax

(a) General rule

Where it is not otherwise provided by this title, the

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[2] Section 3505 provides in pertinent part:

§ 3505. Liability of third parties paying or providing for wages

(a) Direct payment by third parties

[I]f a lender, surety, or other person, who is not an employer * * * with respect to an employee or group of employees, pays wages directly to such an employee or group of employees, * * * such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes * * * required to be deducted and withheld from such wages by such employer.

(b) Personal liability where funds are supplied

If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer, with actual notice or knowledge (within the meaning of section 6323(i)(1)) that such employer does not intend to or will not be able to make timely payment * * * of tax required * * * to be deducted and withheld * * *, such lender, surety, or other person shall be liable in his own person and estate to the United States * * *. However, the liability of such lender, surety, or other person shall be limited to an amount equal to 25 percent of the amount so supplied * * *.

(c) Effect of payment

Any amount paid to the United States pursuant to this section shall be credited against the liability of the employer.

> Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof.

Two other Code sections are integral to this issue. 26 U.S.C. § 6501, entitled "Limitations on assessment and collection," provides in pertinent part that: "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed * * * and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period." 26 U.S.C. § 6502 provides in pertinent part:

> § 6502. Collection after assessment
>
> (a) Length of period
>
> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> (1) within 6 years after the assessment of the tax * * *.

Thus, making an assessment within the three-year time limit prescribed by section 6501 permits collection efforts up to six years after assessment, or a total of nine years after a return is filed.

II. BACKGROUND.

In December of 1981, Messina Builders and Contractors Company, Inc. ("Messina"), a Missouri corporation engaged in general contracting and remodeling, entered into two subcontracts for the City of Kansas City, Missouri, with Dummie, Inc. ("Dummie"), a Missouri corporation owned by Charles E. Edwards ("Edwards"). Edwards also owned C&C Plumbing Company, Inc.

("C&C"), whose employees performed the work on the two subcontracts. After six months Dummie was financially unable to continue, and Messina finished the project. Edwards filed tax returns and amended returns with the IRS for the second and third quarters of 1982, reporting taxes due on the wages paid to C&C employees for their work on the project. No payment was made, however, with any of these returns.

The IRS made assessments and gave C&C notice and demand for payment of the taxes, plus interest and penalties for a total of $13,235.22. Then, more than sixty days after having made assessments against C&C, the IRS demanded payment from Messina pursuant to section 3505(b), alleging that Messina had supplied funds to Dummie to pay the C&C employees performing the work. Messina denied the allegations and defended on the ground, inter alia, that the time limit of section 6303 had expired. The district court granted summary judgment for Messina and the United States brought this appeal.

III. SCOPE AND STANDARD OF REVIEW.

The parties agreed in the district court that the sole issue for determination was whether the notice provision of section 6303 is a condition to the liability imposed by section 3505(b). Accordingly, we limit our review to that issue. *Rogers v. Masem,* 788 F.2d 1288, 1292 (8th Cir. 1986).

When reviewing an appeal from a district court's grant of a motion for summary judgment, we apply the same standard as the district court was to have applied. *Elbe v. Yankton Indep. School Dist. No. 1,* 714 F.2d 848, 850 (8th Cir. 1983). We must view all facts and reasonable inferences drawn from the facts in the light most favorable to the party opposing the motion. *Kresse v. Home Ins. Co.,* 765 F.2d 753, 754 (8th Cir. 1985). Summary judgment may be granted only when there is no genuine issue

of material fact and the moving party has proved he is entitled to judgment as a matter of law. *Id. See also* Fed. R. Civ. P. 56(c).

IV. DISCUSSION.

This issue has left the courts of appeals in disarray. The Seventh and Eleventh Circuits hold that section 6303 requires notice to a third-party lender,[3] *United States v. Associates Commercial Corp.*, 721 F.2d 1904 (7th Cir. 1983); *United States v. Merchants Nat. Bank of Mobile*, 772 F.2d 1522 (11th Cir. 1985),[4] while the Third and Ninth Circuits hold that notice to a third-party lender is not required. *United States v. Jersey Shore State Bank*, 781 F.2d 974 (3d Cir. 1986), *cert. granted*, 54 U.S.L.W. 3793 (U.S. June 2, 1986) (No. 85-1736); *United States v. Hunter Engineers & Constructors, Inc.*, 789 F.2d 1436 (9th Cir. 1986). We believe the Seventh and Eleventh Circuits espouse the better view, requiring notice to a third party.

The government advances substantially the same arguments set out in *Associates, Merchants, Jersey Shore,* and *Hunter;* in short, (1) that notice protection is only necessary for tax collection by levy, not by suit; (2) that notice to a third party is inappropriate and unnecessary; (3) that the government's right to sue for taxes, without notice and demand, is a common-law right independent of statute; (4) that requiring notice to a third party would greatly hinder the tax collection efforts of the IRS; and (5) that any prior changes in the Code did not expand the notice requirement.

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[3] Our use of the word "lender" is not intended to limit the applicability only to lenders. We use it instead as a convenient way to refer to all persons who may be subject to section 3505 liability.

[4] The Eleventh Circuit in *Merchants*, in a short per curiam opinion, simply "agree[d] with the Seventh Ciruit's reading of the applicable statutory provisions * * *." *Merchants* at 1524.

Although many aspects of these arguments are persuasive and the equities are far from one-sided, these considerations must bow to the plain language and meaning of the statute, which specifies that "each person liable" for the tax must receive notice. As Judge Weis aptly stated, dissenting in *Jersey Shore*:

> The IRS wishes us to redraft that section so that it requires notice only to those individuals against whom taxes have been assessed. The reasons offered for this revision have some logic and would possibly ease administrative burdens on the government, but the arguments are directed to the wrong forum. They should be presented to Congress, not the courts.

Jersey Shore at 983-84 (Weis, J., dissenting).

A. Plain language.

In *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), the Supreme Court stated:

> As in all cases involving statutory construction, "our starting point must be the language employed by Congress," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). Thus "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The language in the statutes under discussion is abundantly clear. Section 3505 establishes that third parties may be liable for an employer's tax. The title of section 3505 reads: "*Liability* of third parties paying or providing for wages" (emphasis added). Both subsections (a) and (b) provide that "such [third-party] lender, surety, or other

person *shall be liable* * * * to the United States" for the delinquent taxes (emphasis added). The conclusion appears inescapable that section 6303(a), when it speaks of "each person liable," includes the third-party lender. Like the Seventh Circuit in *Associates,* we conclude that Congress in section 3505 "established a nexus between the taxpayer's obligation and the lender's liability," *Associates* at 1097, and that the same limitations period should apply to both, for the requirement of notice to "each person liable for the unpaid tax" is clear in requiring notice to the third party.

B. Administrative proceeding v. lawsuit.

The government argues that notice is only necessary for administrative collections such as levy or distraint, where the government may proceed summarily, and that where the government must proceed by lawsuit, as with section 3505, service of the complaint provides adequate notice. The *Jersey Shore* court also distinguished between tax collection by administrative process and tax collection by lawsuit, pointing out that "the predecessor statute to section 6303(a) explicitly applied only to the collection efforts of the tax Collector, who by statute was authorized to collect taxes solely by administrative means, such as levying on the taxpayer's property. I.R.C. § 3655 (1952)." *Jersey Shore* at 979.

We disagree. The plain lanaguage of section 6303(a) does not support the position set forth in *Jersey Shore* and argued by the government. The *Associates* court stated that:

> Section 6303(a) itself does not indicate that the right to notice is dependent on which tax collection option the government uses. * * * Section 6303(a) requires

> notice of the assessment of unpaid taxes in order to protect the person liable for paying the taxes, * * * and this rationale applies regardless of which collection mechanism is used.

Associates at 1100.

Our interpretation finds support in the mechanics of sections 3505 and 6303. Without notice, a third party could wait up to nine years after the employer files a return to learn of his potential liability. As Judge Will stated in the district court in *Associates,* "[t]he possiblity of prejudice is obvious. Records and personnel may no longer be available. The opportunity to mitigate by making voluntary payments is lost. Interest mounts. The possibility of recovering from the borrower-employer diminishes. All of these would be obviated by notice." *Associates,* 548 F.Supp. 171, 174 (N.D. Ill. 1982).

C. Applicability to third-party lender.

The government, following the reasoning of the Third Circuit in *Jersey Shore,* argues that section 6303(a) was not intended to apply to a third-party lender. The *Jersey Shore* court noted that "a section 6303(a) notice consists of two discrete elements: (i) notice of the amount that has been assessed and (ii) a *demand* that the individual receiving the notice *presently* satisfy that assessment." *Jersey Shore,* at 978 (emphasis in original). The *Jersey Shore,* court noted that the amounts of the employer's and the lender's tax liability will probably differ because the lender is not liable for the employer's portion of payroll taxes and because section 3505(b) limits lender liability to twenty-five percent of its loan. The court reasoned that notifying the third party of the employer's liability would be misleading and inappropriate. The court also noted that section 6303(a) does not demand payment from the third-party lender; rather, the government seeks at that time to

collect only from the employer. The court was persuaded by these factors that Congress did not intend third-party lenders to receive notice of assessment.

We disagree, finding an alternative interpretation equally plausible. A party receiving 6303(a) notice learns two things: that the government is seeking payment of delinquent taxes, and the amount of those delinquent taxes. The third party presumably will know that the employer is the source of the liability and thus has the opportunity to contact the employer and attempt to correct the situation, or at least, to stop advancing sums to the employer and thus lessen the total amount of liability. The notice provided to a third party, notifying him that the employer is delinquent and that the IRS is demanding payment for the amount the employer owes, thus serves an important function. To minimize the possibility that a third party will misinterpret the notice as a demand that the third party immediately pay a larger sum than he may owe, it would not be overly burdensome for the IRS to amend the notice to include explanatory information relating to the legal status of the third-party lender.

D. Requirement of knowledge by third party.

The government next argues that because section 3505 requires a third party to have knowledge of the employer's financial state, the possibility for prejudice to the third party is nonexistent and additional notice would "serve no useful purpose." As the *Jersey Shore,* court stated, "section 3505 liability only arises if the third party * * * is * * * actually or constructively aware of its *potential* liability for the taxes required to be deducted and withheld." *Jersey Shore* at 982 (emphasis in original).

The definition of "actual" knowledge in section 3505 is so broad, however, as to create liability even with no actual knowledge. The Ninth Circuir in *Hunter* admitted

that "we agree that this statutory scheme does not wholly negate the possibility of prejudice to the lender * * *." *Hunter* at 1441. Section 3505(b) requires the lender to have "actual notice or knowledge (within the meaning of section 6323(i)(1))" that the employer did not intend to or could not pay the taxes. Code section 6323(i)(1) provides that an organization is deemed to have actual notice of a fact that would have been brought to its attention had it exercised due diligence. Thus, a lender who has no actual knowledge of the employer's failure to pay the tax but who has failed to exercise due diligence is nonetheless subject to section 3505(b) liability.

Alternatively, as Judge Will pointed out in the district court in *Associates,* "the mere fact that a lender is aware * * * that the government has filed a claim for unpaid withholding taxes is hardly notice to the lender that the government will seek to hold it liable under section 3505(b) * * *." *Associates,* 548 F. Supp. at 174-75. Notice is therefore necessary to lenders regardless of their actual knowledge of the employer's liability. As Messina points out, evern assuming the lender knows of his potential liability under section 3505(b), the government still must provide notice upon assessment for the same reason that the government, upon making an assessment against a taxpayer who has filed a return but who has failed to pay in full, must still give notice to the taxpayer even though he is aware of his tax liability.

E. Government's common-law right to sue.

The government argues that it has a common-law right, existing independently of any statute, to sue on a debt. The government points out that no statute makes a suit by the United States to collect tax dependent on notice and demand, and thus a failure to assess or give notice will not

bar a suit. This argument, however, ignores the fact that section 3505 creates a derivative liability, nonexistent at common law. As the Eleventh Circuit stated in *Merchants*:

> The United States also argues that even if § 6303(a) requires notice to third-parties such as MNB, the failure to give notice does not preclude suit to collect on MNB's alleged § 3505 liability. The United States contends that it has an inherent common law right to sue to collect debts which is entirely independent of the assessment process. Appellant, however, ignores the fact that third-party derivative liability of the sort set forth in § 3505 is a creature of statutory, not common, law. This argument is therefore untenable.

Merchants at 1524 n.1.

We thus reject the government's attempt to recharacterize the third-party liability imposed by section 3505.

F. Administrative burden.

The government next argues that the increased adminsitrative burden imposed by third-party notice "would effectively render section 3505 a dead letter." The *Associates* court called a similar claim "highly speculative and unsupported by any convincing statistics." *Associates* at 1099. The *Jersey Shore* court disagreed, stating that "in light of the manner such taxes are collected, available statistics and common sense both dictate that such a requirement would impose a prohibitory investigative burden on the government." *Jersey Shore* at 983. Although we recognize that a third-party notice requirement imposes an increased burden upon the IRS, this burden is not an unreasonable one. The IRS could modify its forms, pursuant to Code section 6011(a), to obtain information from the employer identifying any third-party lenders. Lenders listed on these returns could then be given a "protective" notice and demand, notifying them of their potential liability and

demanding payment only if their loans violate section 3505. The IRS could also make separate assessments of the lenders' section 3505(b) liability.[5] Because section 6501 allows a separate assessment to be made within three years from the time the employer's return is filed, this would give the IRS reasonable time to proceed. The IRS could, alternatively, make a supplemental assessment pursuant to Code section 6204(a), which permits a supplemental assessment "whenever it is ascertained that any assessment is imperfect or incomplete in any material respect."

By using either a separate or a supplemental assessment, the IRS could first quickly assess the employer, thereby avoiding a delay that "would seriously jeopardize the government's interest in collecting the taxes from the employer, because such a practice would enable other creditors to obtain prior liens against the employer's property." *Jersey Shore* at 983. The IRS would then have three years in which to investigate the employer and file a separate or supplemental assessment, then provide notice to the third party. This result would give the IRS time to conduct a full investigation while shortening the time the third party is unaware of its potential liability from nine years to a more equitable three years.

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[5] We disagree with the Ninth Circuit's holding in *United States v. Dixieline Financial, Inc.*, 594 F.2d 1311, 1312 (9th Cir. 1979), that because the assessment against the employer represents "the amount of the only sum in question," thus "independent assessment [against the third party] would accomplish nothing." As the Third Circuit acknowledged in *Jersey Shore*, the amount of the lender's liability will probably differ from the amount of the employer's liability, because of "both the differences between the taxes for which the employer and third party are liable and the limitations on liability contained within section 3505 itself." *Jersey Shore* at 978. Thus an independent assessment of the lender's liability has substantial informative value, and would allow the IRS to give the lender timely notice of that assessment and thereby maintain a section 3505(b) action.

G. Legislative history.

We next address the government's interpretation of the legislative history. The government points out that although the predecessor to section 6303(a) was revised to become section 6303(a) in the 1954 Code, the Committee Reports stated that section 6303 "contains two changes from existing law," neither of which is pertinent to the issue of notice to a third party. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A405-06, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4017, 4553; S. Rep. No. 1622, 83d Cong., 2d Sess. 574, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4621, 5222-23. The government concludes from this that because the predecessor to section 6303(a) required notice only to an assessed party, therefore section 6303(a) also requires notice only to an assessed party, *i.e.*, the employer. We decline to accept this somewhat scant legislative history as dispositive. First, section 3505 did not exist when section 6303(a) assumed its present form, so it is fruitless to speculate as to whether section 6303(a) was intended to apply to section 3505. Second, contrary to the government's assertion, it is unclear whether the predecessor to section 6303(a) would have required notice only to an employer in the context of a collection arising under section 3505.

We find, moreover, that the legislative history offers equal support for our position. The *Hunter* court noted that "[w]hile * * * statements [in the legislative history] are unequivocal and clearly indicate Congress' intent that lenders be liable within the ambit of section 3505(b), they do not indicate whether lenders are due the notice specified in section 6303(a)." *Hunter* at 1439. Unlike the *Hunter* court, we find that the plain language of section 6303(a) expresses the congressional intent that third-party lenders receive notice. Moreover, the absence of clear support in the legislative history for the government's position must be construed against the government. "[C]ongres-

sional silence, no matter how 'clanging,' cannot override the words of the statute." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275, 3285 n.13 (1985). In sum, we find that the legislative history, which is inconclusive at best, falls far short of the showing required to overcome the plain language of the statutes under discussion.

For the foregoing reasons, we agree with the view held by the Seventh Circuit in *Associates*,[6] and followed by the Eleventh Circuit in *Merchants*, that the IRS must provide timely notice to a third-party lender when proceeding under section 3505(b).

FAIRCHILD, Senior Circuit Judge, dissenting.

Because I find the reasoning of *United States v. Jersey Shore State Bank*, 781 F.2d 974 (3rd Cir. 1986), *cert. granted*, 34 U.S.L.W. 3793 (U.S. June 2, 1986) (No. 85-1736) and *United States v. Hunter Engineers & Constructors, Inc.*, 789 F.2d 1436 (9th Cir. 1986) more persuasive, I must respectfully dissent.

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[6] We note that the *Associate* court, in reaching its holding, followed what it perceived to be the Ninth Circuit's reasoning in *United States v. Dixieline Financial, Inc.*, 594 F.2d 1311 (9th Cir. 1979), that notice to a third-party lender is required. The Ninth Circuit subsequently clarified its position in *Hunter*, stating:

> Admittedly, our language can be interpreted to imply that notice to lenders is required. Indeed, courts have relied in substantial part on *Dixieline* to conclude that notice to lenders is required [citations omitted]. We believe that reliance was misplaced. * * * *Dixieline* does not alter our conclusion today that section 6303(a) does not require notice to third party lenders facing potential liability under section 3505.

Hunter at 1440. Our reading of *Associates*, however, convinces us that its reasoning stands firm despite the loss of *Dixieline* to support its decision.

I add only two observations concerning the language at issue:

(1) An assessment is a determination that one or more persons are liable for a tax. It seems a natural reading of § 6303(a) that "each person liable for the unpaid tax" means each person whose liability has been determined by the assessment referred to. The facts essential to liability of third-party providers are not determined by the assessment.

(2) Section 3505 does not, literally, make the third-party provider "liable for the unpaid tax," but "liable * * * in a sum equal to the taxes."

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-2505WM

UNITED STATES OF AMERICA, APPELLANT,

v.

MESSINA BUILDERS AND CONTRACTORS CO., ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

September 23, 1986

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 84-0668-CV-W-9

UNITED STATES OF AMERICA, PLAINTIFF,

v.

MESSINA BUILDERS AND CONTRACTORS COMPANY, INC., AND MIKE MESSINA, DEFENDANTS.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff United States initiated this lawsuit by filing its complaint asserting a claim against defendant Messina Builders and Contractors Company, Inc.[1] for unpaid employment withholding taxes pursuant to 26 U.S.C. § 3505(b).

Pursuant to agreement between the parties, the case has been submitted on defendant's motion for summary judgment based on a stipulated factual record. The parties agree that the sole issue for determination is whether the notice provision of Internal Revenue Code § 6303, 26 U.S.C. § 6303, is a condition to the liability imposed by Internal Reveune Code § 3505(b), 26 U.S.C. § 3505(b).

[1] Plaintiff originally asserted claims against both Messina Builders and Contractors Company, Inc. and Mike Messina. Pursuant to agreement between the parties, defendant Mike Messina was dismissed by Order dated September 17, 1985.

Summary Judgment Standard

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the Court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Inland Oil and Transport Co. v. United States,* 600 F.2d 725, 728-28 (8th Cir. 1979), *cert. denied* 444 U.S. 991 (1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning,* 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter,* 501 F.2d 698, 703 (8th Cir. 1978). However, summary judgment is an extreme remedy which should not be granted, unless the moving party has established his right to judgment beyond controversy. *Ozark Milling Co. v. Allied Mills, Inc.*, 480 F.2d 1014, 1015 (8th Cir. 1975); *Oskey Gasoline and Oil Co. v. Continental Oil Co.*, 534 F.2d 1281, 1285 n.9 (8th Cir. 1976).

Stipulated Facts

Messina Builders and Contractors Company, Inc. (MBCC) is a Missouri corporation engaged in the general contracting and remodeling business. Mike Messina is the president of MBCC. In 1981, MBCC became the prime contractor on two construction contracts with the City of Kansas City, Missouri, the Independence project and the South Hyde Park project.

On December 7, 1981, MBCC entered into a subcontract with Dummie, Inc. for the Independence project. Two weeks later MBCC entered into a subcontract with Dummie, Inc. for the South Hyde Park project. Dummie, Inc. was a Missouri corporation owned by Charles E. Edwards.

Work began on the two subcontracts in March 1982, and continued through September 1982. On or about September 17, 1982, Edwards notified MBCC that Dummie, Inc. would not complete the Independence and South Hyde Park subcontracts.

On July 31, 1982, Edwards filed with the Internal Revenue Service a Form 941 tax return under the name of C & C Plumbing Company for the second quarter of 1982, indicating gross wages of $21,303.26 and a withholding tax liability of $6,158.64. On May 3, 1985, Edwards filed an amended return for this period indicating gross wages of $22,688.38 and withholding tax liability of $6,548.85. On October 12, 1982, Edwards signed and filed with the Internal Revenue Service a Form 941 tax return under the name of C & C Plumbing for the third quarter of 1982, indicating gross wages of $21,831.98 and withholding tax liability of $6,212.99. On May 3, 1983, Edwards filed an amended return for this period indicating gross wages of $25,912.35 and withholding tax liability of $7,736.23. No payment was made on these returns. These returns reported the employment and withholding tax liabilities due on the wages paid the employees of C & C Plumbing for their work on the Independence and South Hyde Park subcontract projects.

Assessments and notice and demand for payment of withholding taxes, interest and penalties for the Independence and South Hyde Park projects were made against C & C Plumbing Company as follows:

Tax Period	Date of Assessment and Notice	Amount of Assessment	Unpaid Balance of Assessment
6/8	9/27/82	$6,158.64(T) 374.02(P) 195.73(I)	$ 4,717.47
	7/11/83	390.21(T)	390.21
9/82	10/27/82	6,212.99(T) 319.65(P)	6,528.14
	8/22/83	1,528.24(T) 76.16(P)	1,599.50
			$13.235.22

(T) Assessed tax
(P) Penalties under Internal Revenue Code Sections 6651 and 6656
(I) Assessed interest

C & C Plumbing has refused and/or neglected to pay the unpaid assessed balance of $13,235.22.

MBCC did not receive notice of the assessment against C & C Plumbing within the time required by 26 U.S.C. § 6303.

On May 2, 1983, Internal Revenue Service revenue agent Roseanne Manley met with Mike Messina regarding the unpaid tax liabilities of C & C Plumbing, Inc. At that time Agent Manley stated that MBCC was responsible for payment of the taxes under Internal Revenue Code Section 3505. Agent Manley presented to Messina two Forms 4219 (Statement of Liability of Lender, Surety or Other Person for Withholding Taxes). Agent Manley demanded payment of the amounts indicated on the Forms 4219. On June 21, 1983, through their attorney, MBCC and Mike Messina refused to pay the liability.

On June 18, 1984, plaintiff filed this action and served a copy of the complaint on defendants on June 22, 1984.

Discussion

Section 3505(b) of the Internal Revenue Code, 26 U.S.C. § 3505(b), imposes liability on a leader or other person who supplies funds to an employer for the specific purpose of paying wages knowing that the "employer does not intend to or will not be able to make timely payment . . ." of employment taxes.

The notice provision set forth in 26 U.S.C. § 6303(a) provides:

> Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

MBCC asserts that the United States cannot recover taxes under §3505(b) because it failed to provide MBCC with notice of the assessments of C & C Plumbing Company's unpaid withholding tax as required by § 6303(a). The United States argues that a) it is not required to give § 6303(a) notice to a person liable for taxes under § 3505(b); and b) even if notice is required, the United States' failure to give notice bars only the administrative collection of the tax and not the filing of a civil action.

In *United States v. Associates Commercial Corp.*, 721 F.2d 1094 (7th Cir. 1983), the Seventh Circuit ruled that

§ 6303(a) mandates notice to a lender or other person subject to § 3505(b) liability.

> Section 6303(a) requires that notice of an assessment of unpaid taxes must be provided to "each person liable for the unpaid tax" within sixty days after the assessment was made, unless otherwise provided by the Internal Revenue Code (note 2 *supra*). Section 3505(b) itself does not exempt from Section 6303(a) notice lenders subject to liability (note 1 *supra*) and we have not found any other tax provision which creates such an exemption. Thus since Associates is a "person liable for the unpaid tax" for the purposes of Section 6303(a), it is entitled to notice of the assessment of the unpaid tax mandated by that statute.

Id. at 1098.

The United States further argued in *Associates* that even if § 6303(a) notice was found to be a prerequisite to the administrative collection of taxes through liens and levies, assessment and notice are not prerequisites to initiating a civil action to collect the debt for unpaid taxes.

> This argument is unpersuasive. Section 6303(a) itself does not indicate that the right to notice is dependent on which tax collection option the government uses. 548 F. Supp. at 175. Section 6303(a) requires notice of the assessment of unpaid taxes in order to protect the person liable for paying the taxes, see *Macatee Inc. v. United States,* 214 F.2d 717, 719 (5th Cir. 1954), and this rationale applies regardless of which collection mechanism is used. 548 F. Supp. at 175.

Associates, 721 F.2d at 1100; *accord United States v. Merchants Nat. Bank of Mobile,* Nos. 84-7513, 84-7522 slip op. (11th Cir. October 7, 1985); *cf. Marvel v. United States,* 719 F.2d 1507, 1514 (10th Cir. 1983); *United States v. National Acceptance Co. of America,* 603 F. Supp. 1351, 1353 (E.D. Mich. 1985).

Each of the arguments raised by the United States in this case was considered and rejected in *Associates*. The United States presents no additional arguments or compelling justification for disregarding the Seventh Circuit's well-reasoned opinion in *Associates*.

Therefore, the failure of the United States to provide MBCC with the § 6303(a) notice bars this collection action against MBCC.

For these reasons, it is hereby ORDERED that:

1) Defendant's motion for summary judgment is granted;

2) Plaintiff's motion for summary judgment is denied;

3) The Clerk of the Court is directed to enter judgment against plaintiff United States and in favor of defendant Messina Builders and Contractors Company; and

4) The costs of this action are assessed against plaintiff.

/s/ D. BROOK BARTLETT
D. Brook Bartlett
United States District Judge

Kansas City, Missouri
October 11, 1985.

APPENDIX D

The Internal Revenue Code (26 U.S.C.), as amended and as in effect for the years at issue, provides in pertinent part:

> SEC. 3505. LIABILITY FOR THIRD PARTIES PAYING OR PROVIDING FOR WAGES.
>
> (a) *Direct Payment By Third Parties.* – For purposes of sections 3102, 3202, 3402, and 3403, if a lender, surety, or other person, who is not an employer under such sections with respect to an employee or group of employees, pays wages directly to such an employee or group of employees, employed by one or more employers, or to an agent on behalf of such employee or employees, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) required to be deducted and withheld from such wages by such employer.
>
> (b) *Personal Liability Where Funds Are Supplied.* – If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer, with actual notice or knowledge (within the meaning of section 6323(i)(1)) that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required by this subtitle to be deducted and withheld by such employer from such wages, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which are not paid over to the United States by such employer with respect to such wages. However, the liability of

such lender, surety, or other person shall be limited to an amount equal to 25 percent of the amount so supplied to or for the account of such employer for such purpose.

(c) *Effect of Payment.*—Any amounts paid to the United States pursuant to this section shall be credited against the liability of the employer.

* * * * *

SEC. 6303. NOTICE AND DEMAND FOR TAX.

(a) *General Rule.*—Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person or shall be sent by mail to such person's last known address.

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40120

No. 86-1007

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

MESSINA BUILDERS AND
CONTRACTORS CO.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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REASONS FOR DENYING THE WRIT

The issue presented in the District Court and the Circuit Court in this case was whether the Government's failure to give a supplier of funds notice pursuant to §6303(a) of the Internal Revenue Code of the assessment against the taxpayer-employer for its unsatisfied withholding tax liability bars the Government from bringing a civil suit against the supplier of funds to impose derivative liability under §3505(b) of the Internal Revenue Code.

In Jersey Shore State Bank v. United States, 479 U.S. _____ (1987), this Court held that §6303(a) does not require the Government to provide notice and a demand for payment to a lender before bringing a civil suit under §3505(b).

Because a review on writ of certiorari is not a matter of right, but of

judicial discretion, it will be granted only when there are special and important reasons therefor. This case does not present such special and important reasons.

Unless the Court wishes to reconsider its decision in Jersey Shore, there is no need to grant plenary review in this case, since there now exists no intercircuit conflict and the case raises no important question of federal law requiring consideration by this Court.

Nor should the Court grant the Petition for a Writ of Certiorari, vacate the judgment and remand the case to the Eighth Circuit for further consideration in light of Jersey Shore, for to do so would result in a fundamentally unfair retroactive application of its rule. In Jersey Shore, the Court decided an issue of first impression whose resolution was

not clearly foreshadowed. Furthermore, the decision interpreted §6303(a) and §3505(b) of the Internal Revenue Code in a manner which the Seventh, Eighth and Eleventh Circuits considered contrary to the plain language of the statutes. Therefore, such a summary disposition of this case would be unjust and inequitable.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit should be denied.

Respectfully submitted,

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